IN THE

Supreme Court of the United States.

H. F. AUTEN, as Receiver of the First National Bank, of Little Rock, Ark.....Plaintiff in Error.

v.

UNITED STATES NATIONAL BANK, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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A brief has been filed heretofore on behalf of the plaintiff in error on the motion to dismiss the writ of error.

The facts upon the merits are set out herein in connection with the particular point discussed.

GENERAL STATEMENT.

The United States National Bank sued the receiver of the First National Bank of Little Rock, Ark., to recover upon the alleged indorsement of the latter bank upon five promissory notes of $5,000 each. Three of the notes were executed on December 7, 1892, by the City Electric Street Railway to Geo. R. Brown and H. G. Allis, payable four months after date. They purported to be indorsed by Brown, Allis and the First National Bank by Allis as president, in the order named.

The other notes were executed on the same day by the McCarthy & Joyce Co. to James Joyce, and were payable four and five months, respectively, after date. They purported to be indorsed by James Joyce, H. G. Allis, and the First National Bank by Allis as president (Tr., pp. 9, 10).

The complaint alleged that the notes belonged to the First National Bank, and that the United States Bank discounted them for it before maturity in the usual course of business.

The receiver's answer denied that either of the notes was ever the property of the Arkansas bank, or was ever delivered to it; denied that the Arkansas bank indorsed either of the notes, or delivered them to the plaintiff; denied that the plaintiff bank acquired the notes in the usual course of business, and denied that plaintiff was an innocent holder of either of the notes (Tr., pp. 4, 6, 7).

At the trial it was proved that none of the notes appeared upon the books of the Arkansas bank, or was ever owned by it; that they were executed for the accommodation of H. G. Allis, who was the president of the Arkansas bank; that he indorsed the notes personally, then indorsed the name of the Arkansas bank upon them by himself as president for his own accommodation, and inclosed them in a letter to the United States National Bank, with a request that it discount them and place the proceeds to the credit of the Arkansas bank. The letter was signed "H. G. Allis, P't." The United States Bank discounted the notes on December 16, 1892—nearly four and five months before the notes matured—and notified the Arkansas bank by telegraph that it had credited proceeds of discounted notes to its account. That was in pursuance of Allis's direction to the United

States Bank. As soon as the notice of the credit was received, Allis caused his account to be credited with the full amount of the proceeds of these notes, as so much cash placed by him to the credit of the Arkansas bank, with the United States Bank. Allis withdrew the money from the Arkansas bank and was thereafter continuously largely indebted to it.

Allis had no special authority from the board of directors to borrow money for the bank, or to indorse or discount its paper. *It was not proved that he had ever before indorsed any of the bank's paper*, or that any director or other officer of the bank knew that he had indorsed the bank's name upon the notes in suit, until it suspended business. The jury was at liberty to find from the evidence that the officers of the Arkansas bank supposed that Allis had discounted his own notes with the United States Bank, and caused the proceeds to be placed to the credit of the Arkansas bank as a convenient method of transmitting the funds. Other details of the evidence will be referred to further on.

The court directed a verdict for the plaintiff, and the judgment was affirmed in the circuit court of appeals.

ASSIGNMENTS OF ERROR.

The court of appeals erred in holding that there was no error in directing a verdict for the defendant in error, and in holding that the trial court committed no error in refusing to charge the jury as requested by the plaintiff in error in each of the following requests, viz:

"1. The defendant in its answer denies the liability of the First National Bank, because he says that the notes sued on

were never the property of the bank, never were upon the books of the bank; that they had never been discounted by the defendant bank; that their execution and discount by the plaintiff bank was a scheme or plan adopted by H. G. Allis to obtain money for his own use and benefit, and that the defendant bank never received any benefit whatever from the transaction.

"2. These defenses would be an absolute bar to recovery by the plaintiff, and your verdict should be for the defendant, unless it shall appear that the plaintiff acted in good faith in the transaction and had no notice, express or implied, of the fraudulent character of the transaction, or want of power or authority in Allis to bind the bank by his indorsement as president, and the procuring the discount of the notes by the plaintiff bank.

"3. In determining whether Allis had authority to discount the notes for the bank, you are instructed that the mere fact that he was president of the bank did not authorize him to do so. The president of a national bank has no authority by virtue of his office simply to bind the bank by indorsement of its name.

"4. Before you find that he had implied authority by reason of the acquiescence of the directors of the defendant bank, you must find that the directors knew that he exercised such authority, or that he had been permitted, without their knowledge, to rediscount notes through a series of transactions such as would amount to a custom to do so, or else that the directors had knowledge that Allis carried on, or negligently permitted him to carry on, such a course of dealing with the plaintiff bank as to induce it to believe that they had conferred the power upon him to indorse or discount notes.

"5. If the plaintiff bank received and discounted these notes under circumstances which were so much out of the course of ordinary and legitimate banking business as to require it to see to it that the agent or officer claiming to act for the defendant bank had special authority so to act, you should find for the defendant.

"6. The borrowing of money by a national bank is so much out of the course of ordinary banking business as to require those making the loans to see to it that the officer or agent making the loan had special authority to borrow money.

"7. The jury are instructed that the president of a national bank has not authority to raise money by discounting the bank's notes without special authority from the board of directors. If, therefore, you find that the notes in suit were discounted by H. G. Allis without special authority of the board of directors, you will find for the defendant, unless you further find from the preponderance of the evidence that the defendant bank received the proceeds of the notes discounted.

"8. Rediscounting paper actually owned by the bank is to all intents and purposes borrowing money by the bank obtaining the discount, where the paper rediscounted is indorsed by the bank obtaining the rediscount in such a manner as to permit recourse upon the indorsing bank, as in this case.

"9. If the jury finds that it was the course of dealing between the plaintiff bank and the First National Bank that notes were rediscounted by the former for the latter upon the credit and indorsement of the latter bank; that the former demanded that the latter should maintain with it a deposit to its credit sufficient to cover its liability upon the rediscounted notes as they

severally matured, and that a credit balance satisfactory to the plaintiff was maintained with it by the First National Bank; that the rediscounted notes were charged upon its books by the plaintiff bank to the First National Bank, as they matured, and then sent to the First National Bank in order to allow it to collect from the makers and prior indorsers for its own benefit, the transaction was a simple borrowing and lending of money; and if the jury finds that the notes in suit were discounted by the plaintiff bank in accordance with such course of dealing, they will find for the defendant, unless they find that the First National Bank received the proceeds of such discount, or that Allis was authorized by the First National Bank to make the discount for it.

"10. The jury are instructed that the business of a national bank is to lend money, not to borrow it; to discount the notes of others, not to get its own notes discounted. If, therefore, you find that the plaintiff discounted the notes in suit, believing that they had been sent to it by an officer of the defendant bank for the purpose of raising money for the bank, then the transaction was so much out of the course of ordinary banking as to require the plaintiff to ascertain that the officer acting for the defendant bank had authority to raise money on the notes for the bank; and if you find that the plaintiff discounted the notes without making inquiry as to the officer's authority, and further find that the officer sending the notes for discount had no special authority to raise money thereon, you must find for the defendant, unless you further find that the defendant bank received the proceeds of the notes.

"11. The jury are instructed that the business of a bank is to lend, not to borrow money; to discount the notes of others, not

to get its own notes discounted. The fact, therefore, that the officers of a national bank make application to another national bank to discount or raise money upon notes is a circumstance which may be considered by them in connection with the other facts and circumstances to determine whether the plaintiff acquired the notes in due course of business.

"12. If the jury finds that it is proved that H. G. Allis was in the habit of superintending the issuing of the defendant bank's paper, that would not justify the plaintiff in relying upon his having authority to issue the notes in suit, unless the evidence shows that the plaintiff knew that the defendant had previously acquiesced in such conduct on Allis's part."

"13. If the jury finds that H. G. Allis was the payee or one of the payees in either of the notes in suit; that he indorsed the same in blank; that he then indorsed the name of the First National Bank immediately under his indorsement by himself as its president, in such manner as to show it was done by him; that he himself transmitted said notes to the plaintiff bank in a letter signed by him as president, and procured the plaintiff bank to discount said notes, your verdict should be for the defendant as to said notes, if you find that Allis made the indorsement of the bank's name for his personal benefit without authority from the bank, unless you further find that the defendant bank ratified the action of Allis in discounting the notes.

"14. If you find that Allis indorsed the name of the First National Bank upon the notes in suit for his own benefit without authority from the First National Bank, and that the plaintiff knew that fact, your verdict should be for the defendant. The

form of the notes in which Allis is payee and indorser was sufficient to carry notice to the plaintiff bank that he was using the First National Bank's name for his personal benefit, if you find that these notes were delivered to the plaintiff bank for discount by Allis, although he professed to act as president of the First National Bank and for its benefit in requesting the discount.

"15. If you find that a part of the notes in suit were transmitted by Allis to the plaintiff with notes in which he was payee and last prior indorser, and that all said notes show that the name of the First National Bank was indorsed thereon by Allis, you are at liberty to take those facts into consideration in determining whether the plaintiff knew that Allis was using the name of the First National Bank for his benefit.

"16. The jury are instructed that, however they may find the facts upon other issues, the receiver is entitled to recover of the plaintiff the amount of $467.86, and they are directed to return a verdict for the receiver in that amount" (Tr., pp. 65-69).

All exceptions were properly saved and each ruling of the court was separately assigned as error (Tr., pp. 78-82).

BRIEF AND ARGUMENT.

It is certain there could be no recovery upon the notes by one who had knowledge of the facts above detailed. The United States Bank is in no better position than one having knowledge of the facts if it did not acquire the notes in the usual course of business. If the facts detailed constitute "borrowing money" the transaction was out of the ordinary course of banking and the lending bank was bound to take notice that Allis had no authority to bind the Arkansas bank.

Borrowing money is out of the usual course of a legitimate banking business, and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so.

Western National Bank *v.* Armstrong, 152 U. S., 346.

Chemical Nat. Bank *v.* Armstrong, 13 C. C. A., 47; S. C., 65 Fed. Rep., 573.

Blanchard *v.* Bank, 21 C. C. A., 319, 323; S. C., 75 Fed. Rep., 249.

United States National Bank *v.* First National Bank of Little Rock, 79 Fed. Rep., 296, 300.

National Bank *v.* Atkinson, 55 Fed. Rep., 465.

Adams *v.* Cook National Bank, partially reported in Ball on National Banks, p. 54.

The act of Congress prescribes that "the affairs of each (banking) association shall be managed by not less than five directors" (Rev. Stat., sec. 5145).

The execution of the daily routine duties of the banking business may be delegated by the directors to agents or officers. The performance of such duties is not the *management* of affairs which is specially devolved upon the board of directors by the bank's charter.

1 Morse, Banking, sec. 116.

There are functions requiring the exercise of judgment and discretion which the directors cannot delegate at all. As to such functions the directors can use the officers of the bank only as the instruments for carrying out their designs after they have acted.

If the directors leave "to the discretion of others the decision of weighty matters covering a wide ground of responsibility, they (that) would amount to an effort in a measure to delegate the 'management' of the business of the bank. To this extent the board of directors cannot go."

1 Morse, Banking, secs. 116-119.

"Thus the making of discounts is *an inalienable function of the directors.** They cannot part with it or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be subdelegated. *The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skillful conduct of which the prosperity of the institution and the safety of persons dealing with it depend.* This duty they cannot shift in whole or in part upon others."

1 Morse, Banking, sec. 117.

See *ex parte* Winson, 3 Story, 411, 425.

Silver Hook Road *v.* Greene, 12 R. I., 164.

That borrowing is one of the functions which the directors cannot shift from themselves, is settled by the decision of Western National Bank *v.* Armstrong, 152 U. S., *sup.*

That was a case in equity. The facts were disputed. The Western National Bank, of New York, contended that the evidence showed that it had loaned to the Fidelity National Bank, of Ohio, the sum of $207,290. The receiver of the Fidelity

*Bank U. S. *v.* Dunn, 6 Pet. 51; Percy *v.* Milandon, 8 Martin (N. S. La.), 68; Bank Commissioners *v.* Bank of Buffalo, 6 Paige, 497.

National contended that the money had been advanced to E. S. Harper individually, who at the time was the principal executive officer of the Ohio bank. The case was determined by the supreme court upon the theory of the first state of facts—that is, that the officers of the New York bank had been led to believe by Harper, the acting president and principal executive officer of the Ohio bank, that he was acting for and on behalf of his bank in procuring the money; and that the New York bank placed the money to the credit of the Ohio bank under the belief that the loan was made to it. The court said:

"It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. * * * The most that can be claimed in this case is, that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

"It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. Stat., 5136, par. 7).

"The power to borrow money or to give notes is not expressly given by the act. *The business of the bank is to lend,*

not to borrow money; to discount the notes of others; not to get its own notes discounted. * * *

"Nor do we doubt that *a bank in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.*

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that *the vice president, however general his powers, could not exercise such a power unless specially authorized so to do*, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown."

The language of the court is plain, and is applicable to the facts of this case. See Judge Sage's interpretation of the case in National Bank *v.* Atkinson, 55 Fed. Rep., 465. It has been construed by other courts to be applicable even to the case of money borrowed by the cashier in the name of his bank. In Chemical National Bank *v.* Armstrong, 65 Fed. Rep., 573, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, said: "It was held (in Bank *v.* Armstrong, *sup.*), that the borrowing of money by a bank, though not illegal, is so

much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money, and that where no such special authority appears, and no ratification of the authorized act is shown, the bank is not liable." The opinion, after quoting some State decisions holding that a cashier of a bank has implied authority to borrow for his bank, proceeds: "The effect of the decision in Bank *v.* Armstrong is to make the above rule as to the authority of a cashier to borrow money for the bank, inapplicable to national banks." The case received the same construction in the Circuit Court of Appeals for the Ninth Circuit, where the power of the cashier was involved.

Blanchard *v.* Chemical National Bank of Tacoma, 75 Fed. Rep., *sup.*

It follows that no officer can bind the bank by borrowing in its name without special authority from the board of directors. Those who deal with the officer or agent know that he can act only in pursuance of a special limited authority, and they must take notice, therefore, of the limitations upon his power, and are charged with notice of his want of power when it is in fact lacking. They deal with him at their peril.

Mechem's Agency, secs. 291, 285.

The learned court below conceded the law to be as stated above, but sought to evade its effect by declaring that discounting or rediscounting the commercial paper of others (although indorsed by the bank obtaining the discount) is a purchase of the paper and not a loan upon the faith of it, and therefore does not

come within the meaning of the Western National Bank *v.* Armstrong, *supra.*

U. S. Nat. Bank *v.* First Nat. Bank, 79 Fed. Rep., 296.

We submit that the distinction attempted to be made, is not sustained either by authority, or by the common understanding or custom of bankers, or by the proof of the transaction in this case.

In the business of banking, rediscounting commercial paper is only a method of borrowing money.

Fleckner *v.* U. S. Bank, 8 Wheat., 338.

National Bank *v.* Johnson, 104 U. S., 277.

Merchants Nat. Bank *v.* Sevier, 14 Fed. Rep., 662.

People *v.* Utica Ins. Co., 15 Johns, 358, 392.

City Bank *v.* Bruce, 17 N. Y., 507, 515.

Smith *v.* Exchange Nat. Bank, 26 Ohio St., 141, 151.

Prescott Bank *v.* Butler, 157 Mass., 548, 550.

Freeman *v.* Brittin, 2 Harr. (N. J.), 191, 206, 207. 209, 211.

Lazear *v.* Nat. Bank, 52 Md., 78, 129.

Wecklar *v.* Bank, 42 Md., 581, 592.

First Nat. Bank *v.* Sherborne, 14 Ill. Ap., 566, 570.

State *v.* Boatman's Sav. Inst., 48 Mo., 189.

Bank *v.* Baldwin, 23 Minn., 198.

Pape *v.* Capital Bank, 20 Kan., 440, 446, 447, 450, 451.

McLean *v.* Lafayette Bank, 3 McLean, 587, 599.

Rodecker *v.* Littaner, 8 C. C. A., 320.

Discount is defined as follows:

"Interest reserved from the amount lent at the time of making a loan." Bouvier's Law Dictionary, title Discount.

"Payment in advance of interest upon money loaned." Webster's Dictionary, title Discount.

"In banking. A charge made at a certain rate per cent for the interest of money advanced on a bill or note or other document due at some future time. This charge, the discounter of the bill, etc., deducts from the amount of the bill, handing over the balance to *the borrower*."

Encyclopaedic Dictionary, title Discount.

Discounting and rediscounting have a fixed legal meaning.

"Nothing can be clearer," says Judge Story, "than that by the language of the commercial world, and the settled practice of the banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon the advance or *loan of money* on negotiable paper, or other evidence of debt, payable at a future day, which are transferred to the bank. We must suppose that the legislature used the language in this, its appropriate sense."

Fleckner *v.* Bank U. S., 8 Wheat., 338.

In National Bank *v.* Johnson, 104 U. S., 271, this court said that in the national bank act "the terms loans and discounts are synonymous."

"The discounting of notes," said Spencer, J., in People *v.* Utica Insurance Company, 15 Johns, 358, 392, "is one mode of lending money."

"In the business of banking the * * * discounting of paper is only a mode of loaning money."

Smith *v.* Exchange Nat. Bank, 26 Ohio St., 141, 151.

"It is not necessary in order to constitute a loan, that there should be in very terms an application to borrow or an agreement to lend. Every advancement of money for the accommodation of another, to be repaid to the person making the advance, by the person receiving it or by any person for him, or by or out of his funds, is literally and legally a loan of money.

Byrne *v.* Kennifeck, 1 Batty's Rep., 273.

Fireday *v.* Wightwick, 1 Tonelyn's Rep., 250.

"Whoever, therefore, gets a bill or note discounted at bank or by an individual, gets a *loan*. He literally borrows money. * * * In short, the position that an ordinary discount of a note or bill is not a *loan* of money, is contradicted, not only by the common sense of the community, but by innumerable cases in England and in this country, in which discounts have been held to be *usurious*, which all admit they could not be unless they involved a loan of money."

Freeman *v.* Brittin, 2 Harr. (N. J.), 191, 206, 207, 209, 211.

"There is a difference between buying a bill and discounting it. The former word is used when the seller does not indorse the bill and is not accountable for its payment."

Bouvier, title Discount, and cases *supra*.

If it were true as held by the court below that the defendant in error was a purchaser and not a lender in the transaction under investigation, then the transaction was *ultra vires*, because a national bank cannot engage in a note broker's business (First Nat. Bank *v.* Nat. Exchange Bank, 92 U. S., 122; Grow *v.* Cock-

rill, as receiver, 63 Ark., 418); and the United States Bank could not recover upon these notes upon the theory that it was an innocent purchaser.

Farmers, etc., Bank *v.* Baldwin, 23 Minn., 198.

Lazear *v.* Nat. Bank, 52 Md., 82.

Ridgway *v.* Nat. Bank, 62 Ky., 216.

Prescott Bank *v.* Butler, 157 Mass., 548.

The evidence shows that both banks treated the transaction as a loan of money.

Aside from the legal definition of the terms loan and discount, the proof in this case shows that both banks treated the series of transactions of which the discount of the notes in suit was a part, as loans of money, and it was therefore error for the court to take the case from the jury upon the assumption that there was no evidence of a loan.

Every officer of the United States National Bank who testified in the cause *expressly denied that his bank had purchased any notes* from the Arkansas bank; and these witnesses are borne out by the evidence of the transactions. In the correspondence between the two banks, they speak of the *rate of interest* to govern their transactions (Tr., pp. 16, 11, 18, 20, 26); the United States Bank wrote to the Arkansas bank, "make your *loan* on us as light as possible, *borrowing* only what you are bound to have, but we will take care of you and give this *loan* as requested" (Tr., p. 28); the United States Bank refused to discount notes unless the Arkansas bank would indorse them (Tr., pp. 15 and 18); the money was advanced upon the credit of the

Arkansas bank (Tr., p. 14); the other parties to the notes were not even looked to for payment by the defendant in error, for its officers say that Allis, who was a party to some of the notes, was never indebted to their bank in any sum whatever (Tr., p. 14); and *the Arkansas bank was required to have funds with the defendant in error to cover its paper as it matured* (Tr., pp. 33, 34, and 37); and the *matured notes were treated as drafts or checks upon the Arkansas bank's account and charged accordingly* (Tr., p. 36, exhibit 54, and exhibit 77, p. 44).

In exhibit 54 to the deposition of the cashier of the United States Bank, the latter says to the Arkansas bank, "your account has been frequently *overdrawn* by collection of your bills discounted," etc. Exhibit 77 shows that every discounted note was charged to the Arkansas bank at maturity, without an effort to collect from the makers and without awaiting returns from Little Rock. In two-thirds of the instances the balance to the credit of the Arkansas bank on the books of the United States Bank, was sufficient to cover the charges. In other instances the account remained in overdraft. That was the usual course of business between the banks. The notes in suit were discounted in accordance with that custom, that is, upon the agreement that the notes were to be paid by the Arkansas bank out of its funds on deposit in the United States Bank.

See Assignment of Error No. 9.

This evidence at least tends to show every element that goes to make a loan of money as distinguished from a sale. It shows an advance of money at an agreed rate of interest upon the

credit of the Arkansas bank, the obligations for which were renewed (Tr., pp. 24 and 28) when not paid in the usual course of business. That of itself was enough to constitute a loan. The term interest relates only to a loan, "for interest is predicable only of loans, being the price paid for the use of money."

Nat. Bank *v.* Johnson, 104 U. S., 276, 277.

But the proof goes further and shows that the Arkansas bank was looked to as the party primarily liable for the repayment of the money, and that it was payable out of its funds on deposit with the United States Bank. When the discounted notes matured they were charged to the Arkansas bank's account just as in any other form of loan. In accordance with an understanding between the banks to that effect, the notes in suit were charged by the United States Bank to the account of the Arkansas bank, and cash standing to the latter's credit on the books of the former was appropriated to their payment after the appointment of the receiver for the Arkansas bank. Other notes which had been regularly discounted by the United States Bank for the Arkansas bank had been paid in the same way, and the United States Bank evidently treated the last transaction exactly as it had done the others.

The proof in the case, in addition to the above, is that bankers regard rediscounting as borrowing (Tr., pp. 47, 51). It is difficult to see how they could regard it in any other light (see Bank *v.* Armstrong, 76 Fed. Rep., 339, 341, 344). The construction placed by the bankers of the United States upon the decision in Western National Bank *v.* Armstrong, 152 U. S., 346, is that it applies to rediscounts as well as to other kinds of

loans. That is shown by the unquestioned evidence of Davis, the cashier of the largest national bank in Arkansas, a witness for the defendant in error. He said that since that decision it was the custom of banks generally to require of an officer who offers to rediscount paper for his bank, evidence of special authority from the board of directors to do so; that the banks in New York City and in other money centers sent out circulars to their correspondents elsewhere to that effect.

That it is equivalent to saying what the courts have repeatedly asserted, that in the business of banking, discounting is only a method of borrowing money; that borrowing in any form is unusual business in banking, and that no officer has power to bind his bank therefor without special authority.

If there were otherwise a doubt as to the meaning of Western National Bank *v.* Armstrong, this practical construction placed upon it by the vast body of intelligent men whose business is directly affected by it, should turn the scale. That construction of the decision not only does not interfere with the transaction of their business (Tr., p. 51), but is a protection to those who invest their capital in banks or trust their earnings upon deposit with them.

If that is not the meaning of Western National Bank *v.* Armstrong, the decision is merely *brutum fulmen*, and for all practical purposes might as well have been decided the other way; for the so-called rediscount furnishes a ready subterfuge to evade the law, and will leave the decision without operation in the business of banking. In that event borrowing will continue to be the ordinary business of banking by the Napoleons of

finance, and the confiding public who put their money in banks or in bank securities will continue to be robbed. The enforcement of the practice pointed out in the opinion cuts off the most fruitful source of bank-wrecking.

The form of the contract by which the borrower promises to repay is immaterial, whether it be the conditional promise of the indorser, or the absolute promise of a maker or guarantor. The bank's credit is as fully pledged in one case as in the other; but the case of the Western National Bank *v.* Armstrong, 152 U. S., *supra*, decides that it is not the province of a bank to pledge its credit to borrow money.

Mussey *v.* Eagle Bank, 9 Met., 306, 314, is authority in point. Speaking of rediscounting, the court said the practice "would confer the power on a single officer to pledge the credit of the bank by the mere writing of his name—a power never contemplated by the legislature, nor intended to be conferred by the stockholders."

See Aetna National Bank *v.* Charter Oak Ins. Co., 50 Conn., 167.

Lamb *v.* Cecil, 28 W. Va., 653.

If the lower court was right in its rulings upon the questions argued above, still it is submitted that the judgment is wrong because Allis had no power, apparent or real, to bind the Arkansas bank by the indorsement or discount of the notes; and because the form of the notes in Allis's hands carried notice that he was using the bank's name for his own accommodation.

The president of a national bank has no authority by virtue of his office to indorse or discount its notes.

The act of Congress, under which national banks are organized, vests the management of the bank's affairs in a board of directors. It authorizes the board to delegate the ministerial and routine duties of banking to "duly authorized officers or agents" (Rev. Stat., sec. 5136, par. 7).

No greater powers than those ordinarily possessed by the corresponding officers of like corporations can be presumed to exist in the officers of a national bank. The act of Congress does not enlarge their powers. The only power expressly conferred by Congress on the president of a national bank is that of presiding at the meetings of the board (Rev. Stat., sec. 5150). Unless, therefore, the records of the bank show that the duties of the president have been otherwise defined by the directors, he must be treated as having no greater powers than are ordinarily incident to the office of president.

Hodges *v.* Bank, 22 Gratt., 51.

"Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the association, the presumption is it was the duty of the board of directors."

U. S. *v.* Britton, 108 U. S., 198.

"The whole business of the bank is confided entirely to the directors; and of course with them it would rest to fix the duties of the cashier or other officers."

Fleckner *v.* Bank of U. S., 8 Wheat., 357.

There was no proof whatever that the board of directors had ever defined the duties of the president, or expressly conferred any power upon him. It is incumbent, therefore, to ascertain what power attaches to the office of president by implication of law.

"Where a charter gives to a board of directors the management of the affairs of the corporation, the president and cashier cannot, without authority from the board, assign choses in action, except when due in the usual course of business."

Angel & Ames, Corporations, sec. 299.

"In the absence of anything in the act of corporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are in the exclusive control of their directors, from whom authority to dispose of their assets must be derived."

Titus *v.* Railway, 37 N. J. L., 98.

Morris *v.* Griffith Wedge Co., 69 Fed. Rep., 131.

"The president of a bank is not the executive officer who has charge of its moneyed operations."

1 Daniel, Neg. Instruments, sec. 393.

"The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name."

National Bank of Commerce *v.* Atkinson, 55 Fed. Rep., 465.

"The president of a bank has no authority to transfer its commercial paper."

Hollowell *v.* Bank of Hamlin, 14 Mass., 178, 180.

Smith *v.* Lawson, 18 W. Va., 212, 228.

Gibson *v.* Goldthwait, 7 Ala., 293.

"The inherent powers, *virtute officii*, of a president are very limited. From his mere official station, he has no more control over the corporate property and funds than any other director. *He cannot, without special authority, borrow money and bind the bank to repay it.*"

1 Boone, Banking, sec. 101.

1 Cook, Corporation Law, sec. 716.

"Unless authorized by the charter, or by a resolution of the board of directors, the president has no power to borrow money in the name of the company and pledge its responsibility, nor to assign its assets as security therefor."

4 Thompson, Corporations, sec. 4644.

In City Electric Street Railway *v.* First National Bank, 62 Ark., 33; S. C., 34 S. W. R., 89, the Supreme Court of Arkansas says:

"Unless the authority is expressly conferred by the charter or given by the board of directors, it may be stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. They have no inherent power to execute notes in the name of the corporation. (Numerous authorities are cited.) Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law."

The text-books and cases cited above refer to numerous authorities to the same effect. But it is useless to cite them, because *this court has taken the same view of the question under the national banking act.*

In Putnam *v.* U. S., 162 U. S., 687, 713, the court says:

"There can be no doubt that the president of a national bank, *virtute officii*, has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president. Indeed, the statutes expressly provide that the powers of the president of a national bank may be defined by the board of directors." The court further says: "The power to draw the check did not inhere in the functions of the president."

If the president of a bank has not power to draw a check in the usual course of business, upon the funds of the bank of which he is president, it is because the powers inherent in his office are limited as stated in the authorities *supra*. He has, therefore, no power to transfer the paper of the bank or to bind it by indorsement.

Section 5209, United States Revised Statutes, recognizes that the power to assign or negotiate the notes of a national bank resides in the board of directors. It is as follows:

"Every president, director, cashier, teller, or agent of any association * * * who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority * * * assigns any note, bond, draft, bill of exchange, mortgage, judgment, or

decree * * * with intent in either case to injure or defraud," etc., shall be guilty of a misdemeanor.

There is a similar statute in Arkansas, namely:

"Every president, cashier, secretary, or other officer, and every agent of any bank * * * who shall willfully and designedly sign, with intent to issue, sell, or pledge * * * any promissory note * * * the signing, issuing, selling, or pledging of which by said president, cashier, treasurer, secretary, or other officer or agent, shall not be authorized by the charter and by-laws of such corporation, upon conviction thereof" shall be guilty of a felony. S. & H. Dig., sec. 1604.

This section applies to national as well as to State banks.

McClelland *v.* Chipman, 164 U. S., 347.

Nat. Bank *v.* Com., 9 Wall., 362.

It has been construed by the Supreme Court of Arkansas, and the construction placed upon it is of course as much a part of the act as though plainly expressed by the legislature. The court said:

"Our statute for the incorporation of business corporations expressly confers the management of their business affairs upon 'not less than three directors.' S. & H. Dig., secs. 1330, 1335. Another section makes it a felony for the president or secretary of a corporation to 'willfully and designedly sign, with intent to issue a promissory note without authority from the charter or by-laws of such corporation.' S. & H. Dig., sec. 1604. Surely the legislature would not have made it a felony for these officers to issue notes if they had such power *virtute officii*. From the above provision it appears that the president and secretary

are not general agents. Whatever power they have to act for the corporation in business matters must be delegated and special."

We submit therefore that it is settled, not only by the decisions before cited, but by the statutes quoted, that Allis had no power by virtue of his office to negotiate the notes of the bank.

Allis was not held out to the public as having power to bind his bank by indorsement of commercial paper.

As the power to bind the bank by indorsement did not inhere in the office of president, and no express authority to do so was shown, it devolved upon the plaintiff below to prove a custom or course of dealing sufficient to induce the jury to infer that the power had been granted by the directors. The burden of proof was upon the plaintiff to show that Allis "had exercised the power habitually with the knowledge of the directors," as was said in Merchants Bank *v.* State Bank, 10 Wallace, 604, or "continuously and publicly in the face of the power that had the right to protest," as Judge Thompson expresses it.

4 Thompson, Corporations, sec. 4884, 4886.

"But as the inherent power of the president is so much more limited than that of the cashier, the evidence of this character from which the right to exercise unusual power can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank."

First Nat. Bank *v.* Kimberlands, 16 W. Va., 581.

The testimony in this record cannot be said to establish such a usage as would justify the court in taking the question from the jury.

There is no conclusive testimony that Allis ever indorsed a note in the name of the bank except those in suit. Although the officers of the United States Bank testified in the case and were asked to state what officer of the Arkansas bank indorsed its name on notes previously discounted, none of them was willing to say that Allis had done so. The jury was at liberty to find that the notes in suit were the first he had ever indorsed and sent out for discount.

The authorities are uniform that a single or occasional use of power is not sufficient to establish a rightful use. Beyond that point, the evidence in this case is conjectural only, and did not justify the court in refusing to submit to the jury the question of fact involved.

Here is the testimony: C. T. Walker testified that while he was cashier of the Arkansas bank in 1891, the cashier or assistant cashier would confer with the president as to the quantity of, and the correspondent to whom, the notes for rediscount were to be sent (Tr., pp. 49, 50).

Q. Merely asked his advice in regard to it?

A. Yes, sir, generally asked his instructions.

Q. And the cashier attended to the business?

A. Yes, sir, or the assistant cashier (Tr., p. 49).

Q. *Did the president ever do anything of that kind?*

A. Not that I remember of.

From that evidence the jury could have inferred that the custom of the bank in 1891, was for the cashier or his assistant to transact the details of the business of rediscounting, which includes the indorsement of notes offered for rediscount. There

is no evidence that the method of transacting the business was ever changed.

E. J. Butler testified that he was a director of the defendant bank in 1891 and 1892, and also while Logan H. Roots was president prior to that time; that Roots, as president, had received special authority from the board of directors to make rediscounts, but that no such authority had ever been granted to Allis.

Q. Did he have authority from the bank to indorse its paper for rediscount?

A. No, sir; never that I was aware of (Tr., p. 53). "I know that there were discounts made, but I cannot recollect any particular rediscounts, but in case there were, I would suppose it was by authority of the board during some time while I was absent." He knew of no instance in which Allis indorsed the name of the bank upon commercial paper until the bank failed.

Q. Were you a regular attendant at the board meetings during that year, 1892?

A. Pretty regular, yes; nearly all the meetings.

Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

A. Never that I knew of.

Q. Who was the cashier of the bank during 1892?

A. Mr. Denney.

Q. Do you know whether he transacted the business as to indorsing and rediscounting for the bank?

A. I always supposed that he did.

Nick Kupferle, another director of the defendant bank and vice president during 1892, said the cashier always attended to

rediscounting. Did not know of Allis attending to that business, and that he had no authority from the board of directors to do so (Tr., p. 55). During that period the cashier was the chief officer, while Allis, as president, was in general control, but he added: "There is a good deal of business to be transacted by the cashier over which the president has no power," and he refused to state that Allis gave direction to the cashier in such matters (Tr., p. 56).

Q. Did you ever know of Mr. Allis indorsing the name of the bank upon its paper for the purpose of rediscounting it?

A. No, sir, never did.

Q. Did you not know he was using the name of the bank on the bank's paper?

A. No, sir.

Q. *You knew he was discounting paper?*

A. *No, sir; it was not his place.* I never knew anything about it until the failure of the bank—that he was using the bank's name (Tr., p. 58).

C. T. Abeles, who was a director during the year 1892, said Allis had no authority from the board to indorse its notes or to rediscount them, and that he never heard of his doing so until after the bank had failed. His information from other directors in 1892 was, that the cashier attended to such business (Tr., p. 58).

M. M. Cohn, who was a director for ten years continuously and went out in January, 1892, knew of no instance in which Allis had indorsed the bank's name upon paper for rediscount. He supposed it was always done by the cashier (Tr., p. 59).

M. H. Johnson (Tr., p. 47) and Oscar Davis (Tr., p. 50), who were cashiers of other banks in Little Rock, testified that it was the custom there for cashiers and not presidents to attend to rediscounting.

No other witness testified as to knowledge of Allis's acts or as to the custom of banks in Little Rock or elsewhere.

On three occasions previous to the one under consideration, Allis, as president, had written letters, inclosing notes to the defendant in error for discount. There is no proof that he indorsed any of the notes which he inclosed. In view of the custom of the First National Bank for the cashier to indorse its paper, the jury had the right to infer that all the notes inclosed in the letters written by Allis were indorsed by the cashier. They had the right to draw the same inference as to the indorsement of the two Dickinson Hardware notes, which were inclosed in the letter of December 13, 1892 (along with the notes in suit), inasmuch as they were shown to have been the bank's property. In the absence of proof to the contrary, the jury had the right to infer that the bank's paper had been rediscounted according to the usage of the bank. There is no presumption that the cashier varied from the established custom, or that he sanctioned an unauthorized course by the president.

It follows that the testimony warranted the jury in reaching the conclusion that the Arkansas bank's course of dealing with the public, and with the defendant in error, was not of a character to cause it to believe that Allis rightfully possessed the power to bind the bank by indorsement of its name upon com-

mercial paper; and it was error to refuse to submit the question to them.

The following quotations from the opinions of courts, are applicable to this phase of the case:

"An insuperable obstacle to recovery by the plaintiff in this case is, that it was not only not within the actual power, but it was not within the apparent power of the president to make notes belonging to, and payable to the order of, the company negotiable by his indorsement, or to negotiate them at all. Proof of one or the other of these facts, is essential to the plaintiff's right to recover, as well as that they are *bona fide* holders for value."

Marine Bank *v.* Clements, 3 Bos., N. Y., 600.

"The president and secretary only, executed the note sued on, and there is no showing that any by-law, act, resolution, or custom of doing business, or authority, was conferred upon the two officers named to execute the note, or transact other business of the corporation. In the absence of such showing, it must be conceded that the note was not originally executed and delivered by the defendant."

Catron *v.* Society of Manchester, 46 Iowa.

"If the company were authorized, in the exercise of legitimate business, to make it, the question is, whether the execution of the note was proved. It is signed by J. Averill, as president, and D. C. Judson, as secretary, and it is shown they were such officers at that time, and that Averill was *also the 'managing agent.'* There is, however, nothing in the nature of those offices, as connected with the object and business of the company, from which a general power to make notes could be inferred. The

affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of the majority of those, duly assembled, as a board, was requisite to make a valid corporate act. The authority of the board, to the president and secretary, was therefore necessary to give validity to the note. This is not shown."

McCullough *v.* Moss, 5 Wend. (N. Y.), 567.

"Much has been said in argument about the hardship of a decree declaring this bond and mortgage invalid, and about the innocence of Leggett. The transaction was, to say the least of it, incautious and unadvised, and if persons will deal, in matters of the most solemn character, with agents who undertake to act out of the scope of their ordinary and acknowledged powers, they must abide by the consequences. As to the innocence of Mr. Leggett, he believed, as he says in his examination, that the assent of the board to the giving of the mortgage had been obtained. I am bound to give credit to his testimony. I may, however, be permitted to say that he founded his belief upon a supposition, rather than a fact, and that he took no means to ascertain whether he was right or wrong. Whether the board had made the order was a matter about which Mr. Leggett could have satisfied himself by simple inquiry. He omitted to ask the question. If he was innocent, he was certainly neither careful nor prudent in the transaction, and I cannot consider him as standing in a situation that entitles him or the bank to the favorable consideration of the court."

Leggett *v.* Banking Co., 1 Saxton (N. J.), 550.

"The law in such cases requires clear proof of the authority of an agent to indorse negotiable paper, and the rule ought to be strictly observed."

Davis *v.* Rockingham Investment Co., 89 Va., 290.

In the last case the court said: "It is proper to add that there is no question as to the *bona fides* of the appellant. He gave value for the note, supposing that the indorsement thereon was authorized and valid. But he did so at his peril and must bear the consequences."

The question of Allis's authority, under this phase of the case, was one of fact for the jury, but the court refused to submit it to them.

See Assignments of Error Nos. 3, 4, and 12.

Even if it had been shown that Allis was employed by the directors to run the bank, that would have constituted him the general agent only as to ordinary transactions incident to its business, and would not have authorized him to borrow money.

Fifth Ward Savings Bank *v.* First National Bank, 47 N. J. Eq., 357.

Life, etc., Ins. Co. *v.* Mechanics Fire Ins. Co., 7 Wend., 31.

McCullough *v.* Moss., 5 Wend., 567.

Western National Bank *v.* Armstrong, 152 U. S., *supra.*

It is not presumed that Allis had the power to bind the defendant bank merely because he assumed the right, as its president, to do so.

All of the authorities heretofore cited sanction the foregoing declaration, expressly or impliedly. There are cases, however, in which it is stated that where it is within the charter powers of a corporation to do a particular act, and it is done by an officer of the corporation, there is a conclusive presumption that the officer had authority to do the act.

The doctrine appears to have been first announced by Judge Swayne in Gelpcke *v.* City of Dubuque, 1 Wallace, 175—a municipal bond case. The doctrine of such cases is that where the legislature vests municipal officers with power to decide a question of fact, the existence of which is made a condition to the issue of bonds, the decision of the officers is so far final that it cannot be collaterally attacked in a suit by a *bona fide* holder of the bonds. The recital of the existence of the condition and the issuance of the bonds constitute a determination of the fact by the officers, and the *bona fide* purchaser has the right to presume that they were issued under circumstances which would give the requisite authority. Hence the rule before stated. The same doctrine was inappropriately announced, though it does not appear to have been applied, in the case of a private corporation, in Merchants Bank *v.* State Bank, 10 Wallace, 664. Judge Swayne, in delivering the opinion, said: "If the contract can be valid under any circumstances, an innocent party has the right to presume their existence, and the corporation is estopped to deny them." The contract there spoken of was made by a

cashier while *acting within the apparent scope of his authority*, as the court assumed. If the language quoted states the law applicable to such a case, it would still have no application to a case like this where the officer was acting beyond the scope of both real and apparent authority. When an agent acts without even the appearance of authority, those dealing with him cannot legally assert that they are misled by a false appearance; hence the doctrine of estoppel can have no application. The failure to appreciate this very plain distinction accounts for the error of some of the decisions, conspicuous among which are:

American Ex. Nat. Bank *v.* Oregon Pottery Co., 55 Fed. Rep., 265.

Thomas *v.* City Nat. Bank (Neb.), 58 N. W. R., 943.

The point actually decided in Merchants Bank *v.* State Bank, *supra*, seems to be that if an officer of a corporation has apparent authority to act, and there is nothing to excite suspicion of a want of actual authority, the corporation is bound. The court said: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred the cashier had authority to bind the defendant." That is exactly what the plaintiff in error asked the court to do in this case as to Allis's authority.

The execution by an agent of a contract which he has no authority to make, amounts to no more than an assertion on his part that he possesses the requisite authority. But a corpora-

tion is not bound by its agent's representations as to his authority or power, any more than a private person is.

4 Thompson, Corporations, sec. 4880.

"It cannot escape attention that the doctrine as thus expressed" (referring to Judge Swayne's *obiter* quoted above about presumption of authority), "is entirely opposed to the general rule that persons dealing with corporations or other principals are bound, at their peril, to take notice of the limitation of the authority of the agents through whom they deal. * * * On the whole it is difficult to find support in reason for the proposition that a man can acquire power by merely exercising it. A single seizure or exercise of power can never, in a judicial sense, be evidence of its rightful possession; there must be something in the nature of a continual or habitual exercise of it, publicly and in the face of those who have the right to oppose it."

4 Thompson, Corporations, sec. 4882.

In City Electric Street Railway *v.* First National Bank, 62 Ark., *sup.*; S. C., 34 S. W. R., 89, the Supreme Court of Arkansas reviews the cases following Judge Swayne's *dictum*, and says that the doctrine "is unsound and not supported by the weight of authority. Besides," says the court, "the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in Bank *v.* Armstrong, 152 U. S., 346." The following cases are to the same effect:

Mechanics Bank *v.* Bank, 5 Wheaton, 326.

U. S. *v.* City Bank of Columbia, 21 How., 356.

The Floyd Acceptances, 7 Wall., 666.

Friedlander *v.* Texas & Pacific Ry., 130 U. S., 416.

Western National Bank *v.* Armstrong, 152 U. S., 346.

The case of People's Bank *v.* National Bank, 101 U. S., 181, has been cited to sustain the position that it will be presumed that an officer of a national bank "has rightfully the power he assumes to exercise," and that the bank is estopped to deny it. The remark is *obiter*; it was made by the judge who delivered the opinion in Merchants Bank *v.* State Bank, 10 Wallace, *supra*, and that case alone is cited. No question of the authority of an officer or agent of the bank could arise upon the facts stated by the court in the People's Bank case. The facts appear to be as follows: The defendant bank, through its vice president, procured the plaintiff bank to discount certain notes executed by one Picket, the payment of which the defendant guaranteed. "Picket delivered the notes to the defendant to be negotiated to the plaintiff, pursuant to a prior agreement made between him and *the defendant* that the latter should so negotiate the notes" (opinion, p. 181). The vice president carried out the prior agreement made by the bank. As it is stated by the court that the bank itself made the agreement, and that it was carried out according to its terms, of course it would be presumed that the officer who executed it had authority to do so.

The Supreme Court of Arkansas in City Electric Street Railway Co. *v.* Bank, *supra*, speaking of the *dicta* in these cases, and quoting from 2 Morawetz, Priv. Corporations, sec. 608, says: "They must be considered in view of the facts of the particular cases in which they were made. Taken alone as statements of a principle of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle."

Nor does the fact that the act of the officer or agent relates to the negotiation of commercial paper make any difference.

The protection which commercial usage throws around negotiable paper cannot be used to establish the authority of an agent to issue or indorse it.

This principle, said Judge Miller, in the Floyd Acceptances, 7 Wallace, 666, 676, is well established in regard to the transactions of individuals, and it is equally applicable to those of corporations. The purchaser of negotiable paper, he said, must, at his peril, see that the officer executing it had authority to bind his principal.

"The first question which propounds itself to a party treating with another who represents himself to be an agent and offers to execute or indorse a negotiable instrument in the name of an alleged principal, is this: Has this person authority to bind his alleged principal in this manner? The inquiry is vital. For if there be no such authority, the alleged principal is not bound."

1 Daniel, Neg. Instruments, sec. 273; ib., 279.

"The very fact to be proved by the plaintiff, and without proving which he could not advance a step, was whether an agency to make" (in this case to indorse) "notes had been constituted at all. This could not be proved by the declarations of the assumed agent or by his representations. * * * The plaintiff failed on the vital issue of authority."

People's Bank *v.* St. Anthony's Church, 109 N. Y., 512, 525, 526.

To the same effect see

City Electric St. Ry. *v.* First National Bank, 62 Ark., *supra.*

Chemical National Bank *v.* Wagner, 93 Ky., 525.

West St. Louis Sav. Bank *v.* Shawnee Bank, 95 U. S., 557.

McCullough *v.* Moss, 5 Denio., 567.

Davis *v.* Rockingham, 89 Va., 290.

These authorities effectually meet the argument of the defendant in error that the burden was on the receiver to show that it took the notes with such knowledge of the fraud of Allis as would amount to bad faith on its part.

That rule of the law-merchant which was intended to protect the innocent holder of negotiable paper, does not enter into this case at all. The United States Bank was bound to look to the authority of the agent through whom it sought to derive title to the notes (Authorities, *supra*).

The form of the notes, while they were in Allis's hands, was constructive notice that the Arkansas bank was an accommodation indorser, and that Allis was using its name for his personal benefit.

The following facts constitute a signal of warning that Allis was using the bank's name for his own benefit, viz: *In three of the notes Allis was payee; on all of them his personal indorsement immediately preceded that of the First National Bank; the name of the bank appeared upon the notes as indorsed by him as president; while he himself offered the five notes together to the defendant in error.*

Here then was the payee of three of the notes having them in possession. The presumption of law that faced the United States Bank under these circumstances was that the Arkansas bank, which appeared as a subsequent indorser, was an accommodation indorser.

1 Daniel, Negotiable Inst., sec. 753.

Lemoyne *v.* Bank, 3 Dill., 44.

Savings Bank *v.* Parmelee, 3 Dill., 403.

Adrian *v.* McCaskill, 9 S. E. Rep. (N. C.), 284.

The same rule applies to the other notes, for as Allis was a party to the notes and had them in possession, the United States bank was bound to assume that he was the owner and that the subsequent indorser was an indorser for accommodation.

"An individual negotiating for the purchase of a bill or note *from one having it in possession, and whose name appears upon it*, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument."

Central Bank *v.* Mammett, 50 N. Y., 158.

As Allis appeared as a party to all the notes and was in possession, the law cast upon the United States Bank the duty of regarding him as the owner, and the Arkansas bank as an accommodation indorser. In that contingency of course there could be no recovery.

But the notes bore evidence of their own death wound in another way. Allis, the payee, and Allis, the indorsee, indorsed

the name of the First National Bank immediately under his individual indorsement. The notes show that the bank's indorsement was made by Allis, for after the bank's name he affixes his own name as president in such way as to plainly indicate that the bank's signature was made by him. Allis was in the corporal possession of the notes. Here again was unmistakable evidence that Allis was using his official trust for his individual interest.

West St. Louis Sav. Bank. *v.* Shawnee Co., 95 U. S., 557.

Park Hotel Co. *v.* Fourth Nat. Bank, 86 Fed. Rep., 742.

Claflin *v.* Farmers Bank, 25 N. Y., 293.

Lee *v.* Smith, 84 Mo., 304.

Lippencott *v.* Shaw Carriage Co., 25 Fed. Rep., 582.

Anderson *v.* Kissam, 35 Fed. Rep., 703.

N. Y. Iron Mine *v.* Negannee Bank, 39 Mich., 644.

The first decision of the United States Circuit Court of Appeals in this case evaded the effect of both classes of the foregoing decisions by the simple suggestion that "the defendant bank itself offered the notes for rediscount." If that is a fact the conclusion is certainly correct. But there is no question upon this record but that Allis was the person who presented the notes for discount. He asserted, it is true, that he presented them on behalf of his bank, but can the United States Bank be heard to say that it was misled by Allis's assertion? Allis was a party to the notes which he offered, and the law apprised the United States Bank that the Arkansas

bank's attitude was just what it appeared to be upon the notes in his hands, notwithstanding his representations to the contrary.

Central Bank *v.* Mammett, 50 N. Y., *sup.*

When the United States Bank was put upon notice that Allis had placed his official indorsement upon his individual notes for his personal benefit, could it relieve itself of its legal obligation to make inquiry of the Arkansas bank, by asking Allis, the perpetrator of the apparent fraud, whether he represented himself or his bank in the transaction? It is obvious it could not.

If Allis had personally presented the notes in suit to the United States Bank for discount, without pretending to represent the Arkansas bank, the United States Bank would have been apprised at once that the Arkansas bank was an accommodation indorser for Allis's benefit, because Allis, the payee and prior indorser, was in possession of the notes. In that case there could have been no recovery against the Arkansas bank. Unless the United States Bank was justified in accepting Allis's statement that his designs were honest, there is no difference between that case and this.

When Allis, as president (impliedly) represented to the United States Bank that his bank had authorized him to indorse its name upon a note then in the possession of Allis, the payee, the United States Bank knew that if his statement was false the Arkansas bank would not be liable upon the indorsement; and it knew that the notes were then in the corporal possession of Allis, the payee and prior indorser, and that it was his hand that had written his bank's indorsement under his personal indorsement, where it would do him the most good if his statement was false. If the knowledge of these facts did not bring home to the United

States Bank notice of Allis's intended fraud, it at least made it the duty of the United States Bank to inquire of the Arkansas bank whether Allis was authorized to represent it.

"Actual notice in such cases is not required, even in suits upon negotiable securities. * * * Constructive notice in such cases is held sufficient, upon the ground that *when a party is about to perform an act which he has reason to believe may affect the rights of third parties*, an inquiry as to the facts is a moral duty and diligence an act of justice."

Angle *v.* N. W. Mut. Life Ins. Co., 92 U. S., 330, 342.

The authorities are hereinbefore collected to show that the rule of the law-merchant that facts sufficient to put one upon inquiry are not enough to defeat an innocent purchaser of commercial paper, has no application to a case like this. The United States Bank was bound to look to the authority of the supposed agent with whom it dealt, and any fact which raised a reasonable suspicion of his want of authority was equivalent to notice.

See ante., p. 39.

In West St. Louis Sav. Bank *v.* Shawnee Co., 95 U. S., *sup.*, G. F. Parmelee, who was cashier of the Shawnee County Bank, made his individual note payable to the order of the West St. Louis Savings Bank, and indorsed it: "G. F. Parmelee, cashier." Chief Justice Waite said: "The form of the paper itself carries notice to the purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is suggested to him, it is his own fault, and as against an innocent party, he must bear the loss."

S. C., 3 Dill., 403.

In Anderson *v.* Kissam, 35 Fed. Rep., *sup.*, Judge Wallace said that in such a case "it can make no difference whether the agent or officer appears to be the party to whom the paper is payable upon the face of the instrument, or whether it appears by extrinsic facts that he is the real party for whose benefit it was made; *consequently when he offers the instrument under circumstances which show that he has made it officially for his private use, the party dealing with him must take notice of his want of authority,* and cannot treat it as the obligation of the principal, unless he can prove the existence of some special and extraordinary authority on the part of the agent."

The case of N. Y. Iron Mine *v.* Negannee Bank, 39 Mich., 644, was a suit on three promissory notes, which had been discounted by the plaintiff; they are set out at page 648 of the report. The second note was made by one corporation, payable to another and indorsed by the latter, both acting through the same agent, Wetmore. Judge Cooley for the court, treating of all the notes, said:

"Moreover, there was that on the face of these notes to suggest special caution; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them, which was adverse to the interest of his principal. * * * We do not think that when the bank discounted such paper without inquiry into the authority of Wetmore, it gave such evidence of prudence and circumspection as placed it in a position to complain of Mr. Tilden's course of business as negligent. A fair statement of the case for the plaintiff is that both

parties have been overtrustful in their dealings with Mr. Wetmore; the defendants not more so than the plaintiff. Unfortunately for the plaintiff the consequences of the overtrust have fallen upon its shoulders."

If there was that on the face of the second note mentioned to suggest caution to the discounter, it should be said that the notes in suit here bore a red light signal of warning. The second note in the last case, as the court said, "was made by Wetmore in one capacity and indorsed by him in another so that apparently he was dealing with himself in making and negotiating all of them" (pp. 650, 651). He was not dealing with himself individually, and yet the court says the form of the note suggested an interest in Wetmore.

The defendant in error argues that it made inquiry and received no intimation from the Arkansas bank that Allis had not the necessary authority. The letter to Denney, the cashier of the Arkansas bank, from the defendant in error which it relies upon, was written after the money had been advanced, and it was received in Little Rock after Allis had appropriated the money to his own use. The uncontroverted evidence is that the money was advanced by the defendant in error and deposited in accordance with Allis's letter of instruction immediately upon its receipt. On the same day Allis took credit for the full amount of the proceeds of the notes upon the books of the Arkansas bank and appropriated the money to his own use. But beyond that, the letter contained no inquiry as to Allis's authority to discount the notes in suit, nor any direct information that they had been discounted upon the credit of the Arkansas bank. It inclosed a note belonging to the latter bank, which it said it had

discounted in accordance with the previous letter from Allis. Allis had inclosed other notes belonging to the bank in the letter containing the notes in suit, and no distinct notice was brought home to Denney that Allis had indorsed any notes, not even those belonging to the bank. By whomsoever the latter were indorsed, the bank got the proceeds, and the knowledge of that fact ended Denney's duty of inquiry. If Allis had caused his own paper to be discounted by the United States Bank at the same time (as appeared to be the case), and credit given to the Arkansas bank for the proceeds on the books of the former, as a convenient method of transmitting the funds to Little Rock, he could take credit individually upon the books of the Arkansas bank without exciting a suspicion upon that score. The jury had a right to conclude that that was the form in which the matter presented itself to Denney, and the question should have been submitted to them. That is a common transaction in banking. *Knowledge of the entries, therefore, crediting the Arkansas bank with the amount received from Allis through the latter bank, did not impute knowledge of the fact that Allis had obtained the money on the bank's indorsement.* But if it had been shown that Denney had full knowledge of the transaction after the loan was effected, that would not have the effect of validating it. He had no such power. It was even beyond the power of the board of directors to ratify the transaction unless the bank had received the proceeds of the loan.

Western National Bank *v.* Armstrong, 152 U. S., *supra.*

In that case the acting cashier of Harper's Bank knew as much about the fraudulent transaction as Denney did of this.

It is submitted that if there were nothing in this case save the proof of Allis's want of authority and the form of the notes, the judgment should be affirmed.

The Arkansas bank did not ratify the president's act.

There is not the slightest evidence in the record that the board of directors of the Arkansas bank, by any act, formal or informal, undertook to ratify Allis's action in the premises, or that any member of the board ever had any knowledge of the transaction prior to the bank's failure.

"It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts."

Western Nat. Bank *v.* Armstrong, 152 U. S., *sup.*

It is not sufficient for the purpose of ratification that the board of directors might have known the facts of the transaction by the exercise of reasonable diligence in the conduct of the bank's affairs.

The question was maturely considered in Murray *v.* Nelson Lumber Co., 143 Mass., 250. The court's language is applicable to this case:

"It is a well settled rule that a ratification of the unauthorized acts of an agent, in order to be effectual, must be made with knowledge on the part of a principal of all the material facts. And the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. *It is not enough for him to*

show that the principal might have known the facts by the use of diligence.

Coombs *v.* Scott, 12 Allen, 493.

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"In the case at bar, therefore, it was incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge, they acquiesced in and adopted it.

"But the instructions given by the court gave to the jury a different test. Under them the jury would naturally understand that it was not necessary to find that the directors knew of the contract, but that it would be sufficient if, in their judgment, the directors, by the use of diligence, might have known it. The instructions are even broader than this, as they told the jury that the directors were presumed to know, and that the jury had a right to suppose, that the directors of a corporation had knowledge of its concerns.

"The inferences which may be drawn from the relation of the directors to the corporation and its concerns, as to the probability of their having a knowledge of the contract in question, is a matter exclusively for the jury. There are no such presumptions of law as those stated in the instructions."

To same effect see

Briggs *v.* Spaulding, 141 U. S., 132.

It has been argued that the Arkansas bank received the proceeds of the notes and that it is liable for that reason.

It has never been so ruled in this case, and the facts do not bear out the contention.

The discount was made in New York City, for, or through Allis, on December 16, 1892, and the proceeds were placed to the credit of the Arkansas bank, on the books of the United States Bank, on December 17, before the transaction was known to anyone at Little Rock, except Allis. He took credit upon the books of the Arkansas bank for the full amount of the proceeds of the notes sued on, as for money procured on his own account from the United States Bank. This was done by a bookkeeper of the Arkansas bank under Allis's direction. At the same time the account of the United States Bank was charged a corresponding amount in obedience to the following charge ticket made and signed by Allis, as president: "Charge United States National Bank, N. Y., for proceeds, Allis, $25,000." The credit ticket, which was also made out by Allis, read as follows: "Deposit in First National Bank, Little Rock, Ark., by H. G. Allis, December 17, 1892. United States National Bank, $25,000;" which means, according to the explanation given in the record, "that Mr. Allis had procured $25,000 of the United States National Bank, which was placed to his credit." The entries were made in the books to accord with the tickets.

It was proved that when the money was placed to the credit of Allis, it was used by him, and that the Arkansas bank got no benefit from the transaction; that he began to draw checks upon the amount at once and was continuously indebted to the bank thereafter (Tr., p. 87). The credit to the Arkansas bank on the books of the United States Bank (created apparently by a deposit of that amount of money there by Allis for his own use) was drawn out in the regular course of business to reimburse the bank for the amount already paid Allis at Little Rock.

It is evident that the Arkansas bank received no benefit from the transaction. It received a credit upon the books of its correspondent in New York, made a corresponding charge upon its own books and paid out the money to the person who caused the credit to be made in New York. As is explained in the record, it was "simply a switching of balances" (Tr., p. 86). On the trial of United States *v.* Allis, Judge Sanborn said of a similar transaction, that it did not show a benefit derived by the bank, but was only a method of bookkeeping.

The facts in Western National Bank *v.* Armstrong, 152 U. S., *sup.*, are substantially the same as those above detailed, and it was there held that the bank occupying the position of the Arkansas bank here, received no benefit. To same effect see

Morris *v.* Griffith Wedge Co., 69 Fed. Rep., 131.

First Nat. Bank *v.* Hanover Nat. Bank, 66 Fed. Rep., 34; S. C., 13 C. C. A., 313.

State National Bank *v.* Newton National Bank, 66 Fed. Rep., 694; S. C., 14 C. C. A., 61.

Chemical Bank *v.* Armstrong, 65 Fed. Rep., 573.

Lemoyne *v.* Bank, 3 Dillon, 44.

Farmers Bank *v.* Bank, 58 Fed. Rep., 638.

But it is argued that the following testimony shows that the Arkansas bank received a part of the proceeds to its own use, viz: "The individual account of H. G. Allis showed an overdraft of $10,678.44 at the beginning of business on December 17."

There was no evidence of the state of the account *at the time the entries were made* on December 17; and the court will bear in mind the previous testimony that Allis thereafter was

in debt to the bank and that it derived no benefit from the transaction.

But if the proof showed that Allis paid a debt of $10,678, to the bank out of the $25,000 received by him, that would not show a ratification by the bank. If the bank had received the whole $25,000 in the same way, it would not amount to a ratification for two reasons, viz: (1) Allis thereby merely discharged a debt, and (2) the directors were ignorant of that fact and all others relating to the transaction.

In Burnett *v.* Gustafson, 54 Iowa, 86, the owner of cattle in Iowa gave a chattle mortgage on them, which was duly recorded. He sold the cattle in a distant city; deposited the proceeds in bank there to the credit of his own bank in Iowa; the latter bank passed the proceeds to his individual credit and applied them to the payment of an antecedent debt due it. An effort was made by the mortgagee to compel the bank to pay the money received by it. The court said: "It is claimed that the bank must account for the money because it received it in payment of a pre-existing debt. Whatever may be regarded as the proper rule respecting the transfer of other property in payment of debts, it cannot be denied that the payment of money in that manner is in accordance with the usual custom of business;" and relief was denied.

In West St. Louis Savings Company *v.* Shawnee County Bank, 3 Dillon, 403, Parmelee was cashier of the defendant bank and was indebted to it. The plaintiff advanced money on a note indorsed by Parmelee as cashier of the defendant bank. The latter bank was sued on its indorsement. Parmelee had indorsed his bank's name upon the note for his own use; his bank,

however, got the proceeds of the note. The directors of the defendant bank did not know of the unauthorized indorsement, and the bank having received the proceeds only in payment of a debt due to it, it was held not liable. The case was affirmed under same style in 95 U. S., 557. To same effect see

Bohart *v.* Osborne, 36 Kan., 284.

Thatcher *v.* Gray, 113 Mass., 291.

To effect a ratification of a contract made by an unauthorized agent by appropriation or retention of the benefits of the contract, the appropriation or retention must be made by the principal with knowledge of the facts. In other words, retention of the benefits without knowledge is not enough.

Western Nat. Bank *v.* Armstrong, 152 U. S., 346, 352.

"It is indispensable that the principal should have the full knowledge of the material facts, otherwise the receipt and retention of the benefits of the unauthorized act is no ratification."

Meecham's Agency, sec. 148.

"A stockholder, who was a treasurer of a street railway corporation, wrote to a customer that she could lend the proceeds of bonds sold by him for her to the corporation, and she told him that she would so lend a part thereof to it, and left the amount in his hands, receiving from him therefor a note made in his name by him alone as treasurer. She was ignorant of and made no inquiries as to its by-laws, which provided that he could sign notes only as the directors might require, but acted in good faith, believing that he also acted honestly and had authority to make the loan and give a note therefor binding on the corporation. The treasurer, who had no such authority in terms, and was a

defaulter, used the loan to cover up his defalcation by paying debts of the corporation. Held, that the customer could not recover against the corporation, either upon the note, or for money had and received."

Craft *v.* Rebecca Ry., 150 Mass., 209.

In that case the treasurer used the plaintiff's money, which he obtained upon a note executed in the name of the defendant corporation, "to cover up and conceal his shortage to the defendant," but the receipt of the proceeds of the note in that way did not render the company liable.

To same effect see

Kelly *v.* Lindsey, 7 Gray, 287.

Railroad Nat. Bank *v.* City of Lowell, 109 Mass., 214.

Agawam Nat. Bank *v.* South Hadley, 128 Mass., 503.

There is nothing in the judgment in People's Bank *v.* National Bank, 101 U. S., 181, opposed to the cases cited. In that case the defendant bank, in order to raise money for its own use, got the plaintiff bank to discount Picket's notes, accompanying them with its written guarantee to pay them at maturity. "Picket delivered the notes to *the defendant* to be negotiated to the plaintiff, pursuant to a prior agreement between him and *the defendant*, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant." This statement of fact, taken from the opinion, shows that the act done in that case was not by an unauthorized agent for his own benefit and without the knowledge of the principal, but by the principal itself for its benefit. "The doctrine of *ultra vires*," say the court, "has no

application to a case like this"—the most obvious meaning of which is, that if the defendant bank had no power to execute a guarantee or no power to borrow money, still as the bank (not its unauthorized officer) had itself gotten money on its contract, it must repay it.

RECAPITULATION.

It cannot be said that the plaintiff acquired the notes in the usual course of business, because: (1) It was a loan to a national bank, which was itself unusual; (2) the loan was not made for legitimate banking purposes; (3) it was unusual for banks in Little Rock or elsewhere in the South to discount at that season of the year; (4) the loan was made upon an unusual length of time (76 Fed. Rep., 345); (5) *it was in excess of 10 per cent of plaintiff in error's capital stock* (Bank *v.* Armstrong, 76 Fed. Rep., 339, 344); (6) it was unusual for the president of a bank in Little Rock to negotiate loans, even if that officer can be said to have such power elsewhere; (7) the president acted wholly without authority in indorsing the notes; (8) and the form of the notes imparted notice that the president was using the bank's name for his own accommodation.

COUNTERCLAIM.

The answer of the defendant in error admitted its indebtedness to the Arkansas bank, and alleged that the sum due was applied as a credit upon the notes sued on (Tr., p. 5). It is not conceded that there was any proof of such an application of payment. If so, the application was after the appointment of the receiver and unauthorized. The receiver was therefore entitled

to a judgment on his counterclaim. There was no plea of set-off. A plea of set-off would have been of no avail in a suit at law.

Scott *v.* Armstrong, 146 U. S., 499.

It follows that even if the defendant in error had obtained judgment upon the notes sued on, the receiver would have been entitled to an independent recovery against the defendant in error, for the amount of the counterclaim.

It is respectfully submitted that the judgment should be reversed.

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